IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27738-1-III**
Respondent and Cross-Appellant,	)	**Division Three**
v.	)	
PAUL ALAN MEGARD,	)	**UNPUBLISHED OPINION**
Appellant.	)	

Kulik, C.J. — Paul Megard entered into a plea agreement on an armed robbery charge. The trial court sentenced Mr. Megard to 180 months' confinement based on an offender score of 14. When Mr. Megard moved to correct the sentence, the State argued that Mr. Megard breached the agreement. The trial court concluded that the miscalculation was a mutual mistake and all parties and the court were equally at fault. Mr. Megard appeals, asserting the trial court did not enforce a special finding regarding same criminal conduct. The State cross-appeals, asserting Mr. Megard breached the plea agreement by bringing a motion in the trial court and by appealing here.

We conclude that Mr. Megard's questioning of the offender score calculation did not constitute a breach of the agreement. There is disagreement about the calculation of Mr. Megard's offender score. Thus, we remand to clarify that the judgment and sentence reflects the special finding if the court did, in fact, adopt it.

FACTS

On February 4, 2006, Okanogan County sheriff's deputies responded to the report of a robbery at Caso's Country Foods. At the scene, the deputies gathered the following information. Two masked men entered, one was armed with a sawed-off shotgun and the other with a revolver pistol. One of the men forced the night manager to open the safe and emptied its contents into a duffel bag. The other man took the four store employees to the produce section. Both men duct taped the employees' hands behind their backs. The men took cell phones from two of the victims and exited through the back door with an amount of cash in excess of $15,000.

The two masked men were later identified as John Mainord and Paul Megard. One of the store employees, Ryan Erks, was involved in planning the robbery. Mr. Erks acted as a victim during the robbery. He was duct taped and left in the produce section with the other three employees. All three men eventually gave confessions to the

deputies. Mr. Megard stated he was the one with the sawed-off shotgun, and he took the pistol from his grandfather's house without permission.

In the third amended information, the State charged Mr. Megard with the following: counts I and II – first degree robbery; counts III to VI – first degree kidnapping; counts VII to X – second degree assault with a deadly weapon; count XI – first degree theft other than a firearm; and count XII – second degree unlawful possession of a firearm. The State charged firearm enhancements for counts I through XI.

Mr. Megard entered into a plea agreement with the State in which he agreed to plead guilty to two counts of first degree robbery, one count of first degree kidnapping, four counts of second degree assault with a deadly weapon, one count of first degree theft other than a firearm, and one count of second degree unlawful possession of a firearm. The State agreed to move to dismiss the remaining three first degree kidnapping charges as well as all 11 firearm enhancements.

The State agreed to recommend the high end of the standard range on each count except count III, first degree kidnapping. In count III, Mr. Megard's offender score was calculated as 14, which put the standard range for the crime at 149 to 198 months. The State agreed to recommend 180 months on count III. The effect of this recommendation would amount to 180 months' incarceration because the standard ranges for all other

counts were lower than 180 months and would be served concurrently.

In the plea agreement, under section 1.2(g) in the special findings, the agreement reads:

> The State agrees that the following counts encompass the same criminal conduct and count as one crime in determining the offender score pursuant to RCW 9.94A.589:
>
> Counts VII-X, Assault in the Second Degree, encompass the same criminal conduct as Counts I and II, Robbery in the First Degree.

Clerk's Papers (CP) at 183.

The second relevant section of the plea agreement is found in section 1.8(a):

> The Defendant understands that the Defendant is in violation of this plea agreement if the . . . (9) defendant argues against or below the agreed sentencing recommendation.

CP at 186.

The court followed the recommendations of the State, outlined in the plea agreement, and entered a judgment and sentence for a total of 180 months' incarceration.

Later, Mr. Megard filed a CrR 7.8(b)(1), (5) motion to correct his judgment and sentence. Mr. Megard asserted that the trial court erred in calculating his offender score by not considering the special finding. The State conceded that Mr. Megard's offender score in count III was miscalculated at 14 and should have been 9. The State then asserted that Mr. Megard violated the plea agreement by arguing against or below the

agreed sentencing recommendation.

The trial court entered an order on January 21, 2009, modifying Mr. Megard's judgment and sentence. The court ordered that Mr. Megard's offender score in count III be modified from 14 to 9. At the hearing on this motion, the trial court found that because all parties were equally at fault for the incorrect offender score, Mr. Megard did not breach the plea agreement. The court ordered that Mr. Megard's 180-month sentence remain in full force and effect.

Mr. Megard appeals. He asserts that the trial court erred when it refused to enforce the special finding. The State cross-appeals, asserting the trial court erred when it concluded Mr. Megard was not in breach of the plea agreement when he challenged the agreed recommendation.

ANALYSIS

Special Finding. Plea agreements are contracts; therefore, issues regarding the interpretation of a plea agreement are questions of law and are reviewed de novo. *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006).

Mr. Megard asserts that the trial court erroneously failed to enforce the special finding in section 1.2(g) of the plea agreement. He interprets the special finding as

saying, unambiguously, that counts VII through X, the four assault charges, are the same criminal conduct. Although he does not specifically say so, it is assumed that he also interprets the special finding to say that the two robbery counts are the same criminal conduct. Mr. Megard asserts that because he was not aware of the special finding, or its impact on his sentence, he is entitled to either withdrawal of his plea or specific performance of the agreement.

"[P]lea agreements are more than simple common-law contracts. Because they concern fundamental rights of the accused, constitutional due process considerations come into play." *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). A plea agreement cannot exceed the statutory authority of the courts. In other words, a defendant cannot agree to a greater sentence than the legislature has allowed for. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 871, 50 P.3d 618 (2002) (quoting *In re Pers. Restraint of Moore*, 116 Wn.2d 30, 38, 803 P.2d 300 (1991)).

The "'defendant must understand the sentencing consequences'" of his or her guilty plea for the plea to be valid and voluntary. *Bisson*, 156 Wn.2d at 517 (quoting *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988)). If the defendant is not informed of the sentencing consequences of his plea, the defendant must be given the option to choose between two remedies: specific performance of the agreement or

withdrawal of the plea. *Id.* (quoting *Miller*, 110 Wn.2d at 536). Similarly, if a defendant pleads guilty pursuant to a plea agreement based on misinformation, the defendant must be given the option of the two remedies—specific performance or withdrawal. *Miller*, 110 Wn.2d at 531 (quoting *State v. Tourtellotte*, 88 Wn.2d 579, 585, 564 P.2d 799 (1977)).

Here, Mr. Megard agreed to the plea agreement and was sentenced to 180 months' incarceration based on an offender score of 14 in count III—first degree kidnapping. Mr. Megard filed a motion to correct his judgment and sentence, claiming he was not informed of the special finding or its impact on sentencing. The trial court considered his motion and concluded that the special finding was not taken into account when calculating his offender score and his offender score in count III should have been 9, not 14. The court entered an order changing his offender score from 14 to 9, but ordered that Mr. Megard's 180-month sentence remain in full force and effect.

Mr. Megard interprets the special finding to mean that the four counts of assault are the same criminal conduct. Same criminal conduct is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Mr. Megard's interpretation is erroneous because multiple counts of a crime cannot be considered the same criminal

conduct if the victims are different. The only feasible interpretation of the special finding here is that the robbery charges encompassed the same criminal conduct as the assault charges for the two victims who were both assaulted and robbed. With this interpretation of the special finding, the trial court corrected Mr. Megard's offender score in the order to modify the judgment and sentence.

Mr. Megard asserts that the trial court failed to enforce the special finding. Generally, if a defendant is sentenced based on an incorrect calculation of his or her offender score, the defendant is entitled to a new sentencing hearing based on the correct offender score. *See In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1997); *Goodwin*, 146 Wn.2d 861. However, the standard range for a crime with an offender score of 14 is the same as the standard range for that of a crime with an offender score of 9. The standard ranges vary only for offender scores 0 through 9; any score above 9 has the same standard sentence range as a 9. RCW 9.94A.510.

The special finding states that "[t]he State agrees that the following counts encompass the same criminal conduct and count as one crime in determining *the offender score* pursuant to RCW 9.94A.589." CP at 183 (emphasis added). The trial court ordered that Mr. Megard's offender score be changed from 14 to 9. Thus, the trial court did enforce the special finding.

Mr. Megard stated in his motion to modify his judgment and sentence: "I do not wish to withdraw my guilty plea, or breach any of the agreements agreed to by myself and the Prosecutor for the state." CP at 129 (emphasis omitted). Mr. Megard asked only that the court correct his offender score. The trial court corrected his offender score by enforcing the special finding. Mr. Megard now asks this court to remand his case and to instruct the trial court to enforce the special finding; however, it appears the trial court has already enforced the special finding. We remand for the trial court to clarify that it did so in its judgment and sentence.

Breach of the Plea Agreement. The State asserts that Mr. Megard breached section 1.8(a)(9) of the plea agreement by filing his motion to correct his judgment and sentence and by filing this appeal, which challenges his sentence. Section 1.8(a)(9) reads:

> The Defendant understands that the Defendant is in violation of this plea agreement if the . . . (9) defendant argues against or below the agreed sentencing recommendation.

CP at 186.

Here, the trial court concluded that Mr. Megard's offender score should have been 9 instead of 14, but the court stated that the change in offender score did not change the sentence because Mr. Megard is maxed out. The trial court then looked to contract law

and concluded there was a mutual mistake because all the parties—both attorneys and the court—were equally at fault here. The trial court concluded that Mr. Megard was not in breach of the agreement because there was a mutual mistake.

Mr. Megard's pro se affidavit in support of his CrR 7.8 motion, the report of proceedings from the hearing on the CrR 7.8 motion, and Mr. Megard's briefs on appeal show that Mr. Megard's goal was to correct his offender score. Any mention of a change in sentencing was based solely on a change in the offender score, if the offender score were to result in a different standard range. The plea agreement prohibits Mr. Megard from arguing "against or below the agreed sentencing recommendation." CP at 186. However, Mr. Megard is not arguing below the agreed sentencing recommendation; instead, he is arguing that the special finding results in a lower offender score. The change in his offender score did not result in a change in the sentence range. The plea agreement does not contain any language prohibiting Mr. Megard from challenging his offender score.

We conclude that Mr. Megard did not breach the plea agreement by correctly asserting that his offender score was miscalculated. We remand for clarification that the judgment and sentence considered the special finding if, in fact, the trial court adopted it.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

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Brown, J. Korsmo, J.